

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, DEPARTMENT OF)
BUSINESS AND INDUSTRY, MORTGAGE)
LENDING DIVISION,)

Plaintiff,)

vs.)

PRIVATE CAPITAL, LLC,)

Defendant.)

Case No.: A529434

Dept. No.: I

Date of Hearing: December 9, 2008

Time of Hearing: 9:00 am.

NOTICE OF HEARING ON RECEIVERSHIP STATUS REPORT and MOTION FOR
COURT APPROVAL OF RECEIVER'S PROPOSED ACTIONS

To: ALL INVESTORS OF LOANS BROKERED AND/OR SERVICED BY
PRIVATE CAPITAL, LLC:

YOU AND EACH OF YOU will please take notice that the undersigned will bring the foregoing **RECEIVERSHIP STATUS REPORT AND MOTION FOR COURT APPROVAL OF RECEIVER'S PROPOSED ACTIONS**, on for hearing in Department I of the above-entitled court on the 9th day of December, 2008, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

1 **NOTC**

2 CATHERINE CORTEZ MASTO

3 Attorney General

4 COLLEEN E. HEMINGWAY

5 Deputy Attorney General

6 100 N. Carson St.

7 Carson City NV 89701

8 775-684-1216

9 Attorneys for State of Nevada,

10 Department of Business & Industry,

11 Division of Mortgage Lending

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 STATE OF NEVADA, DEPARTMENT OF)
15 BUSINESS AND INDUSTRY, MORTGAGE)
16 LENDING DIVISION,)

17 Plaintiff,

18 vs.

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20 Defendant.

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21 **NOTICE OF HEARING ON RECEIVERSHIP STATUS REPORT and MOTION FOR COURT**

22 **APPROVAL OF RECEIVER'S PROPOSED ACTIONS**

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24 CAPITAL, LLC:

25 YOU AND EACH OF YOU will please take notice that the undersigned will bring the
26 foregoing **RECEIVERSHIP STATUS REPORT AND MOTION FOR COURT APPROVAL OF**
27 **RECEIVER'S PROPOSED ACTIONS**, on for hearing in Department I of the

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1 above-entitled court on the 9th day of December, 2008, at the hour of 9:00 a.m., or as soon
2 thereafter as counsel may be heard.

3 Dated this 30th day of October, 2008.

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5 CATHERINE CORTEZ MASTO
Attorney General

6
7 By _____
COLLEEN E. HEMINGWAY
8 Deputy Attorney General
100 N. Carson St.
9 Carson City NV 89701
775-684-1216
10 *Attorneys for Plaintiff*

11
12 **MOTION FOR COURT APPROVAL OF RECEIVER'S PROPOSED ACTIONS**

13 COMES NOW, Plaintiff, State of Nevada, Department of Business and Industry,
14 Mortgage Lending Division (hereinafter, the "DIVISION") by and through counsel,
15 CATHERINE CORTEZ MASTO, Attorney General and COLLEEN E. HEMINGWAY, Deputy
16 Attorney General, respectfully requests this Honorable Court to enter this Order authorizing
17 the DIVISION to take the actions set forth herein on behalf of the Receivership in this matter.

18 The DIVISION respectfully requests this Honorable Court to order the following:

19 1. That loan servicing of the Fortius Fund loan, a loan initially brokered and
20 serviced by DEFENDANT, be transferred from the control of U.S. Loan Servicing (hereinafter,
21 "U.S. LOAN"), which has resigned as loan servicer, to Trinity Lending, LLC (hereinafter,
22 "TRINITY"), another duly licensed mortgage broker with the ability to service said loan in the
23 State of Nevada;

24 2. That the DIVISION be permitted to dispose or donate to charity nine (9)
25 computers and destroy one (1) server taken from the DEFENDANT'S premises;

26 3. That the DIVISION be permitted to sell, for reasonable market value, or
27 otherwise dispose of where not cost effective to maintain, certain fractional interests owned by
28 the DEFENDANT in various, small real estate investments.

1 This Motion is based upon the papers, and pleadings on file herein, the Points and
2 Authorities attached hereto, and the oral argument of counsel at the time of hearing, if any.

3 Dated this 30th day of October, 2008

4 CATHERINE CORTEZ MASTO
Attorney General

6 By _____
7 COLLEEN E. HEMINGWAY
8 Deputy Attorney General
9 100 N. Carson St.
10 Carson City NV 89701
11 775-684-1216
12 Attorneys for PLAINTIFF

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 BACKGROUND

13 On October 24, 2006 an order appointing PLAINTIFF'S ("DIVISION") Commissioner as
14 the receiver of DEFENDANT was entered, pursuant to NRS 645B.640(2), to preserve the
15 assets and financial viability of PRIVATE CAPITAL, LLC. (hereinafter, "DEFENDANT"), a
16 previously licensed mortgage broker in the State of Nevada.

17 On July 7, 2008 the Court ordered 1) the power and authority of the Receiver,
18 previously vested in former DIVISION Commissioner, SCOTT BICE, be conferred upon the
19 current DIVISION Commissioner, JOSEPH L. WALTUCH in all respects, 2) the servicing of
20 the Fortius Fund loan be TEMPORARILY transferred from the control of US LOAN
21 SERVICING, which had resigned as loan servicer, to Trinity Lending, LLC., another duly
22 licensed mortgage broker with the ability to service this loan in the State of Nevada, with the
23 understanding that a full hearing be promptly sought by the DIVISION wherein all parties will
24 be properly noticed of the issue, prior to the transfer becoming permanent, 3) the DIVISION
25 be permitted to retain counsel in the State of California to pursue a quiet title action, in the
26 wake of a fraudulent "Subordination Agreement" falsely executed in DEFENDANT'S name as
27 to real property located in that state, and to defend a similar action brought against the
28 Receivership, in order to protect the rights of the parties therein.

1 **CURRENT RECEIVERSHIP ISSUES TO BE ADDRESSED**

2 1. On July 7, 2008, this Court temporarily replaced US LOAN, which resigned as
3 Loan Servicer, with Trinity Lending, LLC., until a full hearing on the issue is noticed for
4 permanent transfer. The Court ordered service as to this full hearing may occur via
5 publication, simultaneously with the prominent placement of notice on the DIVISION'S
6 website, www.mld.nv.gov.

7 2. To the best of the DIVISION'S understanding, DEFENDANT as the entity in
8 receivership (hereinafter, "RECEIVERSHIP") maintains control over three (3) bank accounts
9 maintained by First Republic Bank. As to these accounts, the DIVISION notes the following:

10 a. The DEFENDANT'S Trust Account currently maintains a balance of
11 \$4,250.13. Since the inception of the RECEIVERSHIP, no deposits or disbursements have
12 been made from this account, nor have any claims been made to these funds. After thorough
13 review of all of the DEFENDANT'S books and records, the DIVISION is unable to ascertain
14 the identity of the owner(s) of the funds in the instant account.

15 b. The DEFENDANT'S Disbursement Account currently maintains a balance
16 of \$59,099.58. Since the inception of the RECEIVERSHIP, no deposits have been made to
17 this account, although \$12,500.00 has been transferred from the account to the third account
18 listed below in order to offset administrative expenses incurred by the RECEIVERSHIP. No
19 claims have been made to these funds. From the books and records of the DEFENDANT, the
20 DIVISION is unable to discern the identity of the owner of these funds, if other than the
21 DEFENDANT. Said funds remain with the RECEIVERSHIP and will continue to be used to
22 pay the expenses of the RECEIVERSHIP, as necessary.

23 c. The DEFENDANT'S LLC Account currently maintains a balance of
24 \$2,131.05. Since the inception of the RECEIVERSHIP, this account has been used to
25 disburse monies in keeping with the administration of the RECEIVERSHIP estate.
26 Specifically, this account has received the sum of \$16,772.36 in interest and principal
27 payments from investments, along with a transfer of \$12,500.00 from the DEFENDANT
28 disbursement account, noted above. The account has been used to compensate US

1 LOAN/Trinity Lending, LLC., for loan service responsibilities and to cover costs and attorney's
2 fees incurred by the DIVISION in conjunction with executing its responsibilities as receiver. It
3 is anticipated that further expenditures from the account will be necessary in light of the
4 ongoing legal actions described more fully below.

5 3. For at least two (2) years, a number of DEFENDANT'S investors had been
6 participants in a loan commonly known as the "Fortius Fund"; one of several investment
7 vehicles created by DEFENDANT wherein individuals would invest monies to be lent to
8 Fortius Fund (i.e., the borrower) (hereinafter, "FORTIUS") for the completion of a real estate
9 project. In return for their investment, these individuals would receive a fractionalized interest
10 in a deed of trust to the project, although the promissory note was held by DEFENDANT, from
11 which they would receive interest payments on the note and a subsequent return of principal
12 at loan maturity. DEFENDANT serviced this loan on behalf of all the investors. The
13 DEFENDANT'S prolific use of this business model led to the large numbers of investors and
14 investment dollars under the DEFENDANT'S control.

15 4. Once real estate prices began to depreciate (during the real estate market
16 meltdown commencing in 2007 and continuing to the present), FORTIUS reached the point of
17 default on its loan with the DEFENDANT. The FORTIUS investors were displeased with the
18 manner in which US LOAN'S handled negotiations with FORTIUS concerning the default, and
19 discussion of the alternatives to foreclosure, and with the apportionment of certain legal costs
20 and taxes to the investors, allegedly without their consent and without a reasonable
21 explanation of how the expenses were incurred and apportioned.

22 5. On March 11, 2008, the RECEIVER convened a meeting of all FORTIUS
23 investors to explore options in the wake of US LOAN'S departure as loan servicer. At the
24 meeting, a majority of FORTIUS investors voted to transfer the servicing rights for the
25 FORTIUS loan to TRINITY LENDING (hereinafter, "TRINITY"), another licensed mortgage
26 broker with the ability to service the loan in the State of Nevada. A majority of the FORTIUS
27 investors voted to forego foreclosure on the FORTIUS loan in the short term, and negotiate a
28 forbearance agreement to bring the loan current.

1 6. Another of DEFENDANT'S ventures for which it solicited investment, was for an
2 entity known as RUBICON INTERNATIONAL DEVELOPMENT, LLC., (hereinafter,
3 "RUBICON"). Through its solicitations, prior to this Honorable Court's imposition of the
4 RECEIVERSHIP, DEFENDANT accumulated approximately thirty (30) investors who lent a
5 total of \$1,550,000.00 to RUBICON for the development of a property in Victorville, California
6 in the County of San Bernardino (hereinafter, the "RUBICON PROPERTY"). The above-
7 referenced debt is secured with a first mortgage against the RUBICON PROPERTY.

8 7. DEFENDANT also obtained an additional three (3) investors who lent a total of
9 \$250,000.00 to RUBICON for further development of the RUBICON PROPERTY. This debt is
10 secured with a second mortgage against the RUBICON PROPERTY.

11 8. Unbeknownst to either the DIVISION or the RECEIVER, so-called
12 "representatives" of RUBICON continued to solicit investments for the development of the
13 RUBICON PROPERTY even after the receivership had been ordered and was in place. The
14 sole known investor who became involved after the Order appointing a receiver had been
15 entered, was given a so-called "Subordination Agreement(s)" purportedly from the
16 DEFENDANT. The subject "Subordination Agreement(s)" purportedly gave this investor the
17 most senior position on the property's title, purportedly superseding the positions of the first
18 and second trust deeds.

19 9. To the best of the DIVISION'S knowledge, the "Subordination Agreements"
20 described above are fraudulent and claim to subordinate two (2) mortgages in favor of an
21 additional loan of \$125,000.00 to RUBICON.

22 10. The two (2) fraudulent "Subordination Agreements" purport to contain the
23 approval of DEFENDANT in favor of an individual named FLOYD C. SANGER, JR. The
24 documents bear the signature of an individual named ERIC ZULEY, who purportedly
25 authorized their issuance on the DEFENDANT'S behalf, as well as that of PAUL HOBBS
26 (hereinafter, "HOBBS"), as manager and owner of RUBICON.

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1 11. An examination of the title to the RUBICON PROPERTY has also revealed that
2 RUBICON has transferred TEN PERCENT (10%) of its ownership in the property to an entity
3 known as SW OCEANA, INC.

4 12. Once the DIVISION became aware of the fraudulent "Subordination
5 Agreement(s)", it filed a lawsuit to quiet title and to obtain declaratory judgment concerning the
6 ownership interests in the Rubicon property, in the Superior Court for San Bernardino County,
7 California (Case No. CIVVS703204).

8 13. To be prudent, the action names all of the individuals and/or entities whose
9 names appear in the fraudulent "Subordination Agreement(s)".

10 14. In September 2007, SW OCEANA, INC., an entity which was another victim of
11 the fraud in question, filed its own actions in both Orange County, California and in San
12 Bernardino County, California seeking to quiet title and obtain relief from alleged fraud. The
13 DEFENDANT was named as a party in those actions.

14 15. The DIVISION plans to move for consolidation of all the lawsuits concerning the
15 Rubicon property. Counsel for the DIVISION has also been in discussions with counsel for
16 SW OCEANA, INC., regarding arrangements for an appraisal of the RUBICON PROPERTY.

17 16. Because litigation in the State of California has been initiated and additional
18 actions are possible, pursuant to this Court's Order of July 7, 2008, the DIVISION retained
19 counsel licensed in the State of California to represent the interests of the receivership.

20 **ADDITIONAL ISSUES TO BE ADDRESSED**

21 1. All loans and/or investment vehicles that were open at the time of
22 DEFENDANT'S placement into the present RECEIVERSHIP are not presently performing (i.e.,
23 have all entered default status for lack of payment), including a number of those where the
24 DEFENDANT, in addition to being the broker for the loans of others, is, itself, a very minor
25 investor in certain projects. Generally, these investments have totaled less than \$1,500.00 in
26 any one particular investment.

27 2. At this time, the majority of the non-performing loans are facing foreclosure.
28 With foreclosure, the management of the loans will revert to the individual investors who may

1 supervise liquidation of the collateral. It is anticipated that the DIVISION be apportioned its
2 *pro rata* share of the expenses related to the management of the foreclosed loans and the
3 liquidation of the collateral thereafter.

4 3. As the foreclosure and liquidation process go forward, it is anticipated that the
5 DIVISION should sell its minor, fractional interests in the properties to other investors or
6 owners, for market value, or, if an investment is determined to be worth less than the cost
7 associated with attempting to sell or maintain ownership, abandon or otherwise dispose of
8 such interest. The DIVISION would thus be removed from serving as fiduciary for an
9 investment in which it, albeit nominally, participates.

10 4. Finally, as a result of the DEFENDANT'S liquidation, the DIVISION is currently in
11 possession of 9 computer terminals (with peripheral equipment) and 1 computer server. After
12 some research, the DIVISION has determined that the computer terminals (with peripheral
13 equipment) are presently valueless. The Division has also determined that the computer
14 server must be destroyed in order to ensure the safety of the investor information that is
15 believed to be stored therein, but which remains inaccessible to the DIVISION. The DIVISION
16 therefore seeks permission to destroy the server and dispose of said computer equipment
17 (with peripherals), or donate it to a local charity in need of such, as the DIVISION deems
18 reasonable.

19 **THIS HONORABLE COURT IS AUTHORIZED TO APPROVE THE REQUESTS HEREIN**

20 Pursuant to NRS Chapter 645B.620, the precise boundaries of the DIVISION'S
21 authority as RECEIVERS for DEFENDANT in the instant matter are not defined in detail.
22 However, *Gottwals v. Manske*, 60 Nev. 76, 99 P.2d 645 (1940) provides that where the extent
23 of a court appointed receiver's authority is not specified with respect to the extent to which the
24 receiver can take action to dispose of or disburse property, it is appropriate is to obtain
25 approval from the appointing court. Upon that basis, PLAINTIFF/RECEIVER hereby moves
26 for this Honorable Court's approval and Order to proceed as requested.

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1 **CONCLUSION**

2 For the foregoing reasons, the DIVISION respectfully requests that this Honorable
3 Court enter its Order providing as follows:

4 1. That the servicing of the FORTIUS loans be permanently transferred from U.S.
5 Loan Servicing to Trinity Lending, LLC;

6 2. That the DIVISION be permitted to dispose of the nine (9) computers and one
7 (1) server taken from the DEFENDANT'S premises;

8 3. That the DIVISION be permitted to sell, for fair market value, any fractional
9 interest in any investment owned by the DEFENDANT, or otherwise dispose of the asset
10 should the DIVISION determine it to be more cost effective to do so rather than attempt to sell
11 or maintain ownership thereof.

12 Dated this 30th day of October 2008.

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14 Respectfully submitted,

15 CATHERINE CORTEZ MASTO
16 Attorney General

17 By _____
18 COLLEEN E. HEMINGWAY
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